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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91185103
Party	Defendant Tiffany Adams
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Cherokee Nation,)	
)	
Opposer)	Opposition No. 91,185,103
v.)	
)	[Serial Nos. 78/748,323]
Tiffany Adams)	
)	
Applicant)	

OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT

Applicant, Tiffany Adams ("Applicant") hereby submits this Opposition to Opposer's Motion for Summary Judgment.

INTRODUCTION

Opposer's basis for a Summary Judgment Motion is that it has "long and pervasive" use of the CHEROKEE NATION mark. With the exception of the casino and golf services, which were commenced long after Applicant's use, Opposer presents no evidence of actual *trademark* use. Instead Opposer relies entirely on innuendo, unsupported conclusions and, as discussed at length in Applicant's Objections to Opposer's Material Statements of Undisputed Facts, unauthenticated, third-party hearsay it found on the internet. Opposer's argument appears to be that Applicant's use disparages Opposer and that because the public is aware of the Cherokee tribe, all uses of the word Cherokee are automatically associated with Opposer. As will be seen, neither the facts nor the law support these contentions. Consequently, Opposer has failed to prove that it is entitled to a Summary Judgment motion on the merits as a matter of law.

Opposer's complete lack of competent evidence to support its claims is enough to defeat the instant Motion. However, there is, unquestionably, a triable issue of fact raised

for virtually every factor in a confusion or dilution analysis and, as such, grounds for the Motion simply do not lie.

**APPLICANT'S MARK IS NOT LIKELY TO CAUSE CONFUSION
WITH OPPOSER'S MARK(S) SINCE APPLICANT
HAS PRIORITY OF USE**

Opposer conflates the use of its tribal name with trademark use. The use of a tribal name to identify a group of persons does not constitute trademark use; yet, the entirety of Opposer's argument rests on its allegation of "long and pervasive use of the mark by Opposer." Motion for Summary Judgment ("MSJ"), p. 1. Ironically, the services which Opposer argues are conflicting or related to Applicant's services such that there is a likelihood of confusion do not share this "long and pervasive use", and instead, commenced long after Applicant's use commenced; namely, no earlier than September 8, 2004. Applicant's claim of first use, August 2002, clearly predates Opposer's claim of first use for the alleged entertainment services, namely, gaming and golf facilities and services, as set forth in the database records for U.S. Registration No. 2,961,563 for CHEROKEE CASINO RESORT, and U.S. Registration No. 2,961,562 for CHEROKEE HILLS GOLF CLUB. Exhibits 1a and 1b; also see Declaration of Tiffany Adams ("Adams Declaration"), para. 2. Further, the specimens submitted with Applicant's underlying application were for entertainment services offered March 9-13, 2004. Adams Decl., para. 2. Opposer's filing date for either of the above cited trademarks were filed April 21, 2004 (see Exhibits 1a and 1b), *subsequent* to Applicant's proof of actual use. Accordingly, without proof of earlier dates of first use by Opposer for these entertainment services, a triable issue of fact remains as Opposer's basis for likelihood of confusion must fail as a matter of law. Indeed, assuming the identified services are considered related, Opposer would be infringing Applicant's mark based on the priority claims of the parties.

Opposer's claims of "long and pervasive" use for its services associated directly with its tribal services are irrelevant. Indeed, use of the mark CHEROKEE for Cherokee services is descriptive, if not generic. This allegation is supported by the Trademark Office, which required 2(f) proof to consider registration of U.S. Application No.

78/758494 (now abandoned) for the mark THE SOUTHERN CHEROKEE NATION for association services, namely, promoting the interests of The Southern Cherokee Nation. Exhibit 2.

Regarding Opposer's claims of priority of use due to its tribal services, it is interesting to note, that Opposer does not cite any federal registration for its services, and the undersigned has not found any such registration or even an application. Accordingly, Opposer is required to prove its common law use. Opposer appears to be resident in Oklahoma. There is no proof of use of any Cherokee services offered by Opposer that would afford nation-wide preemptive rights.

Opposer rests its argument, not on proof of use, but on the blanket allegation that its mark is famous, and thus, "a connection would be presumed" (SMJ, p. 2, and 17), and the naked presumption that "Opposer's marks have long been recognized as referring to Opposer" (SMJ, p. 14). Obviously, the marketplace supports a very different reality. For years, both CHEROKEE clothing and GRAND CHEROKEE for utility vehicles has been in the marketplace. Exhibit 3a-3d (photographs of shirt and utility vehicle bearing CHEROKEE mark), and Declaration of Anna M. Vradenburgh, para. 4. No confusion has ever been created by the existence of these goods bearing the CHEROKEE mark by TWO different third parties. Accordingly, the statement that "Opposer's marks have long been recognized as referring to Opposer" does not necessarily imply exclusive recognition as evinced by the evidence that has existed in the marketplace for years and years. Accordingly, this automatic presumption of affiliation is simply not supported by fact.

Further still, the U.S. Trademark Office has allowed a myriad of third party registrations using the same term. See Exhibit 4 (Trademark Office Search Results). The search results reveals 200 applications and registrations that include the word CHEROKEE. Of these 200, approximately 53 are dead and the rest are pending or registered. None is owned by Opposer. Accordingly, there is clear evidence that supports Applicant's contention that regardless of alleged fame, no "connection would be presumed", and in fact, it is doubtful that any ever has been presumed. Indeed, no one believes CHEROKEE clothing is manufactured by the Cherokee Nation, or its members, or is otherwise connected with the Cherokee Nation. Similarly, no one would confuse a

Jeep Grand Cherokee with a product offered by the Cherokee nation. Opposer confuses public awareness of the Cherokee tribe with the presumption that any product or service including the Cherokee name is sponsored by, or affiliated with, Opposer. Opposer is simply wrong.

Applicant contends that Opposer's failure to register the mark CHEROKEE for its goods and services, and its failure to treat it as a trademark has supported a marketplace that keenly distinguishes the goods and services bearing a mark CHEROKEE, and is not confused or likely to be confused. Indeed, in the present case, Applicant has never been confused with, or presumed to be affiliated with, or sponsored by, the Opposer. Adam Declaration, para. 3.

Opposer argues that the channels of trade are similar between the Applicant's services and Opposer's services. However, this cannot be true. Opposer's golf and casino services are offered on tribal land, a very specific location that is clearly associated with Opposer. Applicant's services have never been offered on tribal land, and most likely, would never occur on tribal land. Adams Decl. at 4. Accordingly, the channels of trade in the marketplace do not overlap, and provide a means for clear distinction of Opposer's goods and services from any other third parties' goods and services, including Applicant's.

Opposer is inconsistent in its analysis of its claim of likelihood of confusion. It suggests that the marks are similar as it compares CHEROKEE and CHEROKEE NATION, but then proceeds to claim that the confusion will arise with respect to the entertainment services. However, the entertainment services allegedly bear the marks CHEROKEE CASINO RESORT, and CHEROKEE HILLS GOLF CLUB. Opposer's inconsistent analysis obfuscates the issues. A likelihood of confusion analysis must be consistent in its comparisons, not inconsistent and selective between a variety of marks. Clearly, Opposer has no registration for CHEROKEE and has offered no proof of use of the mark CHEROKEE by itself. Its claimed mark is CHEROKEE NATION. The "NATION" in the mark connotes the source. Most consumers would likely not realize that the casino and golf services offered by Opposer are associated with the Opposer, except for the fact that these services are offered on tribal property, a narrow and geographically-delimited channel of trade.

Opposer argues that the marks are used in connection with similar services. Since, as stated above, Applicant's claimed date of use precedes Opposer's date, if this is true, Opposer is infringing Applicant. Opposer conveniently recites "entertainment services" and does not even suggest that there may be more to the description. Obviously, neither party could obtain a registration for merely entertainment services, and thus, distinctions between the two exist. In particular, Applicant's services clearly states "adult entertainment services." See Applicant's underlying application of record. The word "adult" has implications in how the services may be rendered and who may receive the services. More specifically, services offered by Applicant are restricted to those 18 years and older, and are provided in a restricted environment. Adams Decl., para. 5. Accordingly, the services do not overlap, nor are they related.

OPPOSER'S CLAIMS OF TARNISHMENT ARE AKIN TO THE 'POT CALLING THE KETTLE BLACK'

Opposer claims that Applicant's proposed mark "undeniably refers to Opposer and/or its members." SMJ, at 2. However, Opposer offers no proof of this "undeniable reference," nor even explains how this occurs. Despite the lack of proof of this undeniable reference, Opposer argues that Applicant's use is "deeply offensive, dehumanizing and disparaging to Opposer and a substantial composite of Opposer's members." SMJ, at 2. As a threshold matter, the standard for dilution by tarnishment is whether the opposed use brings the mark (and the goods and services offered thereunder) into disrepute. Opposer has failed to identify any such goods and services that it alleges would be tarnished by allowing registration of Applicant's mark.

Opposer's entire likelihood of confusion argument rests on the fact that Applicant's services are related to Opposer's entertainment services. Opposer offers gambling. Further still, Opposer appears to own, has allowed, or is licensing, the use of CHEROKEE for a gambling casino associated with Harrahs – "Harrahs Cherokee Casino." Harrahs operates a number of casinos and is known for offering topless dancing. Exhibits 5a-5d. The only presumption that can be gleaned from this is that it is not Applicant's services that are "deeply offensive, dehumanizing and disparaging to

Opposer and a substantial composite of Opposer's members," but the fact that Opposer does not gain any financial benefit from them, unlike its relationship with Harrahs.

Further, Opposer has apparently had no issue with registrations for CHEROKEE that were directed to the similar "vices" of drinking and tobacco. For instance, no opposition was lodged against U.S. Registration 2,745,125 for wine; U.S. Registration No. 3,280,515 for cigarettes (mark includes image of Indian in head dress); and U.S. Registration No. 2,909,426 for cigarettes (mark includes image of Indian in head dress). Exhibits 6a-6c, respectively. Apparently, Opposer is quite comfortable with the vices of drinking, smoking, gambling and nudity. None of these are "deeply offensive, dehumanizing and disparaging."

Further, it is ironic that Opposer argues tarnishment, but simultaneously argues likelihood of confusion based on similar services. Opposer's arguments are contradictory and beg the question: if Applicant's services tarnish Opposer, then Opposer's similar or related services should tarnish Opposer. If they do not, then neither does Applicant's by Opposer's own statements and conduct in offering these services.

Contrary to Opposer's assertions, the likely meaning of the mark does not disparage Opposer. Adams Decl., para. 6. Opposer argues that in *Doughboy*, the Patent Office noted the meaning of 'Doughboy' as "a name given to American WWI soldiers and that the applicant's use of the mark [was] intended to have that meaning as evidenced by specimens submitted with the application." SMJ, at 21-22. This is not applicable in this instance.

Opposer attempts to argue that the Applicant attempts to portray herself as an Indian because she has "long, dark, straight hair and a dark complexion." By this description, much of Latin America, the Middle East, Greece or Italy would be accused of trying to portray themselves as Native Americans. Stated mildly, this argument is absurd. Indeed, there is nothing depicted in the specimen of record likely to be associated with those of Native American descent. Further, Applicant does not intend or attempt to be associated with the image of, or portray, an "Indian Princess." See Adams Declaration, para. 8. Applicant does not chant, mimic a rain dance, or adopt any other characteristics that could be construed as emanating from descendants of Native Americans. *Id.* at para. 7.

Further, Opposer argues that Applicant's mark is used to "fetishize Opposer", "subject its members to demented fantasies", and "associate[] Opposer and its members with deviant sexual activity." SMJ, at 22. Adams Decl., para. 9. Frankly, these comments are nonsensical, prejudicial, unsupported by evidence and are presented solely to inflame. Indeed, Opposer is an entity. An entity cannot be fetishized. Further, Opposer presents no evidence of what is considered "deviant sexual activity" (other than opposing counsel's personal opinion), Opposer owns, licenses or approves of the use of the CHEROKEE mark with a company that is associated with topless dancing, and fails to specifically state how its members are subjected to "demented fantasies." Opposer's attempts to create an issue where none exists are meritless as they are based on pure fantasy and unsupported conjecture.

**OPPOSER'S OBJECTIONS TO THE SUPPLEMENTAL
DECLARATION OF ANNA M. VRADENBURGH EVIDENCE BAD FAITH**

Opposer' objections to the Supplemental Declaration of Anna M. Vradenburgh on the basis of the affidavit language strains credulity, especially in light of the serious misrepresentations made in Opposer's Reply to Applicant's Motion to Strike. For convenience, a revised supplemental declaration is attached herewith (Exhibit 7), again evincing the granting of the extension of time to respond to discovery, including the undersigned's confirmation to Opposer's counsel of the same.

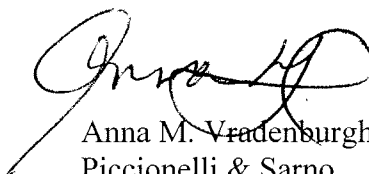
Opposer's counsel appears to have deliberately ignored the basis of the supplemental declaration; namely, to bring to the Board's attention what was presumed by the undersigned to be an error or oversight on the part of Opposer's counsel. In light of the blatant failure to even acknowledge the fact that an extension to respond to discovery had been granted by Opposer's counsel, and withdraw the factually misrepresented rebuttal arguments to Applicant's Motion to Strike, the undersigned is left to wonder whether the misrepresentation was intentional. The timely serving of the discovery responses by Applicant vacates most of Opposer's arguments regarding Applicant's admissions and lack of evidence. Accordingly, Applicant respectfully requests the Board deny Opposer's Motion for Summary Judgment as there are clearly triable issues of fact.

CONCLUSION

In light of the foregoing, the Applicant contends that triable issues of fact exist in the matter and that Opposer is not entitled to a Summary Judgment as a matter of law. Indeed, the alleged evidence submitted by Opposer cannot support its motion as it fails as competent evidence and is inadmissible as 'proof', thereby rendering the Motion for Summary Judgment without evidentiary support. As supported by the facts of this case, the granting of the Summary Judgment motion would be premature and would circumvent Opposer's burden to prove its allegations and prevent Applicant from rightfully receiving a registration.

Respectfully submitted,

Date: June 19, 2007



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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Cherokee Nation,)	
)	
Opposer)	Opposition No. 91,185,103
v.)	
)	[Serial Nos. 78/748,323]
Tiffany Adams)	
)	
Applicant)	

**OBJECTIONS TO OPPOSER'S STATEMENT OF UNDISPUTED MATERIAL
FACTS IN SUPPORT OF OPPOSITION TO OPPOSER'S MOTION FOR
SUMMARY JUDGMENT**

OSUMF No. 1:

Opposer, Cherokee Nation, is a federally recognized Indian tribe that provides governmental, social, financial, educational, and other services to its tribal citizens. Opposer is the second largest Indian tribe in the United States. Nearly 70,000 citizens live within Opposer's Tribal Jurisdictional Service Area and more than 200,000 citizens are dispersed throughout the world. See Notice of Opposition, II 1, Ex. 1;1 Cherokee Nation, A Brief History of the Cherokee Nation, <http://www.cherokee.org/Culture/571Page/print.aspx> (accessed Mar. 12, 2009), Ex. 2; Cherokee Nation, 2008 Report to the Cherokee People, Ex. 3.

Applicant's Objection OSUMF No. 1:

Irrelevant: The issue of the composition of the Cherokee Nation has no bearing on any of the issues in this matter.

Hearsay: The exhibits offered in support OSUMF No. 1 are not properly authenticated or admissible pursuant to TBMP 528.05(e).

Exhibit 1: The Notice of Opposition contains naked and unauthenticated assertions by counsel for Opposer. As Opposer bears the burden of proof in this matter, it must introduce evidence to support these assertions. Obviously, it cannot simply rely on the allegations of the opposition as any kind of "proof."

Exhibit 2: This exhibit consists of a screen print of an internet webpage. TTAB rules specifically address such documents:

“Internet evidence and other material that is not self-authenticating. The element of self-authentication cannot be presumed to be capable of being satisfied by information obtained and printed out from the Internet. Internet postings are transitory in nature as they may be modified or deleted at any time without notice and thus are not "subject to the safeguard that the party against whom the evidence is offered is readily able to corroborate or refute the authenticity of what is proffered." For this reason, Internet printouts cannot be considered the equivalent of printouts from, for example, a NEXIS search where printouts are the electronic equivalents of the printed publications and permanent sources for the publications are identified. [citations omitted]
TBMP 528.05(e)

The only authentication provided is by counsel for Opposer and, this is, clearly, insufficient.

Exhibit 3: This exhibit is, ostensibly, a “Report to the Cherokee People” from 2008 and, presumably, is offered as either a printed publication or official record, both of which would be self-authentication. It is, however, neither.

TBMP 528.05(e) provides, pertinent part, that “printed publications must be available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in a proceeding.” Exhibit 3, the “2008 Report to the Cherokee People,” is, by definition, not available to the general public and as such does not qualify as a self-authenticating document.

TBMP 528.05 provides, further, that, “The term "official records," as used in 37 CFR § 2.122(e), refers not to a party's company business records, but rather to the records of public offices or agencies, or records kept in the performance of duty by a public officer.” Exhibit 3 does constitute such a record and as such does not qualify as a self-authenticating document.

Exhibit 3 is authenticated solely by counsel for Opposer. Counsel lacks personal knowledge of any of the facts contained therein and, as such, is not competent to authenticate the truth of the matter asserted herein.

OSUMF No. 2:

Opposer has used the mark CHEROKEE NATION, and more generally, the mark CHEROKEE, in conjunction with its governmental, social, financial, educational, and other services since at least 1791 (Treaty of Holston, July 2, 1791). See Notice of Opposition, 'II 2, Ex. 1; Cherokee Nation, Treaty of Holston, 1791, <http://www.cherokee.org/Culture/130/Page/print.aspx> (accessed Mar. 12, 2009), Ex. 4. Opposer has priority in Opposer's marks over Applicant's priority in her proposed mark. See Application at 2, Ex. 5 (identifying 8/00/2002 as date of first use anywhere).

Applicants Objection to OSUMF No. 2:Hearsay:

Exhibit 1: Applicant incorporates by reference its prior objections to Exhibit 1 as if fully set forth herein. As already discussed, Opposer's Notice of Opposition does not constitute competent or admissible evidence.

Exhibit 2: Exhibit 2 is a document that, by Opposer's own admission, appears on a non-governmental website. It therefore fails to meet the admissibility and authentication requirements of TBMP 528.05(e). Moreover, this document appears to be from Opposer's own website. As such, it is simply an unsworn statement by Opposer, introduced outside of the context of a declaration sworn under penalty of perjury.

Relevance:

Exhibit 2: At issue are trademark rights, which arise from use in commerce. The unauthenticated copy of the Treaty of Holston purports to be a treaty by the Executive with the Cherokee Nation. It does not constitute a use in commerce, and is therefore irrelevant to anything at issue in this matter. As such, Opposer has failed, utterly, to demonstrate a first-use-in-commerce earlier than that recited by Applicant on its registration application.

OSUMF No. 3:

Since its initial use of its CHEROKEE NATION and CHEROKEE marks, Opposer has continuously used, advertised, promoted, and offered its governmental, social, financial, educational and other services under the CHEROKEE NATION and CHEROKEE marks with the result that individuals have come to know and recognize Opposer's CHEROKEE NATION and CHEROKEE marks and to associate the same with Opposer and/or Opposer's services. See Notice of Opposition, 113, Ex. 1; Wikipedia.org,

Cherokee, <http://en.wikipedia.org/w/index.php?title=Cherokee&printable=yes> (accessed Mar. 10, 2009), Ex. 6; Cherokee Nation, 2008 Report to the Cherokee People, Ex. 3.

Applicants Objections to OSUMF No. 3:

Hearsay:

Exhibit 1: Applicant incorporates by reference its prior objections to Exhibit 1 as if fully set forth herein. As already discussed, Opposer's Notice of Opposition does not constitute competent or admissible evidence.

Exhibit 3: Applicant incorporates by reference its prior objections to Exhibit 3 as if fully set forth herein. This document qualifies as neither a public record nor a publication and, as such, is inadmissible.

Exhibit 6: Applicant incorporates by reference its prior objections to Exhibit 2 as if fully set forth herein. As shown, an internet web page, particularly one from as notoriously inaccurate a website as Wikipedia, fails to satisfy the admissibility requirements of TBMP 528.05(e).

Opposer has thus failed to adduce any admissible evidence, much less evidence that is undisputed, that it has "continuously used, advertised, promoted, and offered its . . . services" anywhere, or in any context.

OSMUF No. 4:

Opposer owns Cherokee Nation Enterprises, L.L.C. ("CNE"). CNE is the gaming and hospitality arm of the Cherokee Nation. CNE owns and operates Cherokee Casino Resort, six (6) Cherokee Casinos, Cherokee Casino Will Rogers Downs, two (2) golf courses, and many other retail operations in Northeast Oklahoma. Id. at 14; Cherokee Nation, Organizations, <http://www.cherokee.org/Organizations/Default.aspx> (accessed Mar. 11, 2009), Ex. 7.

Applicant's Objections to OSMFU No. 4:

Hearsay:

Exhibit 3: Applicant incorporates by reference its prior objections to Exhibit 3 as if fully set forth herein. This document qualifies as neither a public record nor a publication and, as such, is inadmissible.

Exhibit 7: Applicant incorporates by reference its prior objections to Exhibit 2 as

if fully set forth herein. As shown, an internet web page, particularly one from as notoriously inaccurate as website as Wikipedia, fails to satisfy the admissibility requirements of TBMP 528.05(e). Moreover, Applicant would note that, if, in fact, Opposer is the owner of the identified operations, it could readily produce competent evidence in support thereof, e.g. Articles of Incorporation, Secretary of State Registrations, stock certificates, etc. Instead, it chose to rely on an internet document from what appears to be its own website, authenticated only by its trademark counsel who lacks personal knowledge of any of the matters asserted therein.

Opposer has thus failed to show that it is the owner of the identified businesses. Nonetheless, Applicant will stipulate that Opposer, as of the date of filing of its Motion for Summary Judgment, is engaged in offering gambling and casino services.

OSMUF No. 5:

Through CNE, Opposer provides entertainment services in connection with its CHEROKEE and CHEROKEE NATION marks. See Cherokee Casino Resort, TARR Status, Ex. 8; Cherokee Hills Golf Club, TARR Status, Ex. 9. Opposer's entertainment services are advertised and promoted via, among other means, the Internet. See Cherokee Casino, Overview, <http://vwww.cherokeecasino.com/Casinos/Tulsa/Overview/tabid/300/Default.aspx> (accessed Mar. 12, 2009), Ex. 10; Cherokee Casino, Cherokee Hills Golf Club, <http://vwww.cherokeecasino.com/Golf/Tulsa/CherokeeHillsGolfClub/tabid1212/Default.aspx> (accessed Mar. 12, 2009), Ex. 11.

Applicant's Objections to OSMUF No. 5:

Relevance:

Exhibits 8, 9, 10, & 11: As Applicant has not asserted, nor has Opposer sought to rebut, a basis for Applicant's rights in her mark on the basis of abandonment, use in commerce of the mark at issue by Opposer on March 12, 2009, is irrelevant to anything at issue. Opposer has alleged that it is the senior user in commerce of various Cherokee marks, but has failed to adduce any evidence thereof. Accordingly, these Exhibits are irrelevant to anything at issue in this matter.

Hearsay:

Exhibits 8 & 9: These internet exhibits merely demonstrate that Opposer has filed

applications that contain the assertions made therein. They are not competent proof as they merely constitute prior consistent statements by opposer, and are thus inadmissible hearsay.

Exhibits 10 & 11: Applicant incorporates by reference its prior objections to Exhibit 2 as if fully set forth herein. Once again, Opposer submits unauthenticated, self-serving and incompetent internet evidence as proof of its assertion. Such evidence is inadmissible.

OSMUF No. 6:

The term "Cherokee," is defined as:

- (i) a Native American people formerly inhabiting the southern Appalachian Mountains from the western Carolinas and eastern Tennessee to northern Georgia, with present-day populations in northeast Oklahoma and western North Carolina. The Cherokee were removed to Indian Territory in the 1830s after conflict with American settlers over rights to traditional lands.
- (ii) a member of this people.
- (iii) the Iroquoian language of the Cherokee.
- (iv)

See Cherokee, The American Heritage Dictionary of the English Language (4th ed. 2000), <http://www.bartleby.com/61/60/CO276006.html> (accessed Mar. 10, 2009), Ex. 12. The word "CHEROKEE" is commonly recognized to refer to the Native American Indian tribe of that same name. See, e.g., Cherokee, AskOxford.com, Compact Oxford English Dictionary, http://askoxford.com/concise_oed/Cherokee?view=ok (accessed Mar. 10, 2009), Ex. 13; Cherokee, Encarta World English Dictionary (North American Ed. 2009), <http://Encarta.msn.com/encn et/features/dictionary/DictionaryResults.aspx?refid=18615965> (accessed Mar. 10, 2009), Ex. 14; Cherokee, Merriam-Webster Online Dictionary (2009), <http://www.merriam-webster.com/dictionary/Cherokee> (accessed Mar. 10, 2009), Ex. 15.

Applicant's Objections to OSMUF No. 6:

Relevance:

Exhibits 12, 13, 14 & 15: Applicant has never contended, nor does she contend, that she is a member of the Cherokee people. Indeed, to do so would have rendered her mark unregistrable as it would have been deemed generic. Using the word "Cherokee" as a source identifier of someone who was Cherokee would be no different than using "Italian" as a source identifier for someone from Italy, or "Catholic" as a source identifier for someone who is a member of the Catholic Church. Applicant has asserted that her mark is arbitrary and neither describes her services or names the genre of services that

she provides. See, e.g., McCarthy on Trademarks §11:11, “OLD CROW whiskey is not distilled from old crows.”

Accordingly, the dictionary definition of “Cherokee” is irrelevant to anything at issue in this proceeding.

Hearsay:

Exhibits 12, 13, 14 & 15: Applicant incorporates by reference its prior objections to Exhibit 2 as if fully set forth herein. Opposer continues to mistake an internet webpage for a self-authenticating source, contrary to the requirements of TBMP 528.05(e). Moreover, at least one of Opposer’s citations is to a third-party, www.bartleby.com, that is not even the publisher of a dictionary but, instead, appears to be some sort of on-line book store.

OSMUF No. 7:

By law, membership in Opposer is limited to those direct blood descendants of a Dawes Act enrollee. See U.S. Dept. of the Interior, Indian Ancestry - Cherokee Indian Ancestry, <http://www.doi.gov/cheeroke.html> (accessed June 25, 2008), Ex. 17.

Applicant’s Objections to OSMUF No. 7:

Relevance:

Exhibits 16 & 17: Applicant incorporates by reference its prior objections to Exhibits 12, 13, 14 & 15 as if fully set forth herein. As already noted, Applicant has made no claim to Cherokee ancestry and her application is for an arbitrary mark. The Dawes Act evidence is therefore irrelevant to anything at issue in this matter.

OSMUF No. 8:

Opposer has excelled and has experienced an unprecedented expansion in economic growth, equality, and prosperity for its citizens, with significant business, corporate, real estate, and agricultural interests, including numerous highly profitable casino operations offering entertainment services at a number of locations. See Cherokee Nation, 2008 Report to the Cherokee People at 7, 14-16, Ex. 3.

Applicant’s Objections to OSMUF No. 8:

Relevance:

Exhibit 3: The purported expansion in economic growth, equality and prosperity

of the citizens of the Cherokee Nation is irrelevant to anything at issue in this matter. It does not support Opposer's claim that it is the prior user of the "Cherokee" mark, nor does it demonstrate continuous use pre-dating that of Applicant.

Hearsay:

Exhibit 3: Applicant incorporates by reference its prior objections to Exhibit 3 as if fully set forth herein. This exhibit is, ostensibly, a "Report to the Cherokee People" from 2008 and, presumably, is offered as either a printed publication or official record, both of which would be self-authentication. It is, however, neither.

TBMP 528.05(e) provides, pertinent part, that "printed publications must be available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in a proceeding." Exhibit 3, the "2008 Report to the Cherokee People," is, by definition, not available to the general public and as such does not qualify as a self-authenticating document.

TBMP 528.05 provides, further, that, "The term "official records," as used in 37 CFR § 2.122(e), refers not to a party's company business records, but rather to the records of public offices or agencies, or records kept in the performance of duty by a public officer." Exhibit 3 does constitute such a record and as such does not qualify as a self-authenticating document.

Exhibit 3 is authenticated solely by counsel for Opposer. Counsel lacks personal knowledge of any of the facts contained therein and, as such, is not competent to authenticate the truth of the matter asserted herein.

OSMUF No. 9:

The total budget for the Opposer from October 2005 through September 2006 exceeded \$380 million. See Cherokee Nation, 2006 Report to the Cherokee People, Financial Report, Ex. 18. Among other things, the Opposer has constructed health clinics throughout Oklahoma, contributed to community development programs, built roads and bridges, constructed learning facilities and universities for its citizens, revitalized language immersion programs for its children and youth, and is a powerful and positive economic and political force. See Cherokee Nation, Clinics and Hospitals, <http://www.cherokee.org/Services/Health/HealthClinics/Default.aspx> (accessed June 25, 2008), Ex. 19; Cherokee Nation, Community Services, <http://www.cherokee.org/Services/Default.aspx?Service=CommDevListing> (accessed June 25, 2008), Ex. 20; Cherokee Nation, Roads Program,

<http://www.cherokee.org/Services/CommDevListing/157/Default.aspx> (accessed June 25, 2008), Ex. 21; Cherokee Nation, Education, <http://www.cherokee.org/Services/Default.aspx?Service=Education> (accessed June 25, 2008), Ex. 22; Cherokee Nation, Culture, <http://www.cherokee.org/Culture/Default.aspx> (accessed June 25, 2008), Ex. 23; Wikipedia.org, Cherokee, <http://en.wikipedia.org/w/index.php?title=Cherokee&printable=yes> (accessed Mar. 10, 2009), Ex. 6.

Applicant's Objections to OSMUF No. 9

Relevance:

Exhibits 18, 19, 20, 21, 22, and 23: The purported budget of the Cherokee Nation as it pertains to the construction of health clinics, community development programs, roads and bridges, learning facilities and universities, language programs is irrelevant and does not establish any relevant fact appurtenant to this proceeding. No information regarding information of sales or expenditures respecting the goods and services associated with the trademark have been presented. It does not support Opposer's claim that it is the prior user of the "Cherokee" mark, nor does it demonstrate continuous use pre-dating that of Applicant.

Hearsay:

Exhibit 18: This exhibit is, ostensibly, a "Report to the Cherokee People" from 2008 and, presumably, is offered as either a printed publication or official record, both of which would be self-authentication. It is, however, neither.

TBMP 528.05(e) provides, pertinent part, that "printed publications must be available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in a proceeding." Exhibit 3, the "2008 Report to the Cherokee People," is, by definition, not available to the general public and as such does not qualify as a self-authenticating document.

TBMP 528.05 provides, further, that, "The term "official records," as used in 37 CFR § 2.122(e), refers not to a party's company business records, but rather to the records of public offices or agencies, or records kept in the performance of duty by a public officer." Exhibit 18 does constitute such a record and as such does not qualify as a self-authenticating document.

Exhibit 18 is authenticated solely by counsel for Opposer. Counsel lacks personal

knowledge of any of the facts contained therein and, as such, is not competent to authenticate the truth of the matter asserted herein.

Exhibits 19-23: These exhibits consist of screen prints of an internet webpage.

TTAB rules specifically address such documents:

“Internet evidence and other material that is not self-authenticating. The element of self-authentication cannot be presumed to be capable of being satisfied by information obtained and printed out from the Internet. Internet postings are transitory in nature as they may be modified or deleted at any time without notice and thus are not "subject to the safeguard that the party against whom the evidence is offered is readily able to corroborate or refute the authenticity of what is proffered." For this reason, Internet printouts cannot be considered the equivalent of printouts from, for example, a NEXIS search where printouts are the electronic equivalents of the printed publications and permanent sources for the publications are identified. [citations omitted]

TBMP 528.05(e)

The only authentication provided is by counsel for Opposer and, this is, clearly, insufficient. Indeed, Exhibits 19-22 are documents that, by Opposer’s own admission, appears on a non-governmental website. It therefore fails to meet the admissibility and authentication requirements of TBMP 528.05(e). Moreover, this document appears to be from Opposer’s own website. As such, it is simply an unsworn statement by Opposer, introduced outside of the context of a declaration sworn under penalty of perjury.

Exhibit 6: Applicant incorporates by reference its prior objections to Exhibits 19-22 set forth above as if fully set forth herein. As shown, an Internet web page, particularly one from as notoriously inaccurate as website as Wikipedia, fails to satisfy the admissibility requirements of TBMP 528.05(e).

OSUMF No. 10:

The United States Patent and Trademark Office ("PTO") has previously concluded on at least four (4) prior occasions that federally recognized Cherokee Indian tribes are sufficiently famous so as to warrant protection from marks falsely suggesting a connection to the Cherokee Nation. See *In re CHEROKEE PROUD*, Office Action, Serial No. 75/506359 at 1-2 (Feb. 11, 1999), Ex. 24; *In re CHEROKEE STONEWORKS*, Office Action, Serial No. 77/122071 at 3-4 (June 4, 2007), Ex. 25; *In re CHEROKEE CHARCOAL*, Office Action, Serial No. 76/683830 at 1-2 (April 4, 2008), Ex. 26; *In re CHEROKEE MY DOLL*, Office Action, Serial No. 77/556232 at 4-5 (Dec. 10, 2008), Ex. 27.

Applicant's Objections to OSUMF No. 10:

Relevance, Best Evidence, Lack of Foundation:

Exhibits 24, 25, 26, and 27: These exhibits consist of U.S. Trademark office actions for four third-party registrations wherein the Trademark Office issued an initial rejection. First, Opposer confuses the issuance of a rejection with a dispositive finding on the merits. Next, Opposer's supposed "fame" was not at issue in any of these office actions, which addressed only false association and/or likelihood of consumer confusion. Moreover, the facts in these applications differ from those of the present case, including the goods and services identified, and the prosecution history, and therefore no relevant comparison can be made. Finally, it should be noted that Serial No. 75/506,359 was registered in 2006, notwithstanding the initial issuance of an office action.

OSUMF No. 11:

Applicant is an adult entertainer who provides live and audio and visual recorded performances of a graphic, sexual nature. On November 7, 2005, Applicant filed an Application for Registration of the mark CHEROKEE. The application was assigned Serial No. 78748323, and was published for opposition in the Official Gazette of March 11, 2008, for Entertainment services, namely, providing live and audio and visual recorded performances by an adult entertainment personality; entertainment services, namely, providing live and non-downloadable recorded performances featuring adult entertainment via satellite, cable, radio, and global computer network; radio entertainment services, namely, radio programs featuring performances by a film and video personality broadcast via satellite and radio; entertainment services in the nature of live-action, drama programs, action and animated motion picture films for cable television, satellite and global computer networks; provision of live action theatrical performances; providing a web site featuring videos in the field of adult entertainment, related video and audio clips, photographs, other multimedia materials and providing information in the field of adult entertainment in International Class 41 with a claimed date of first use in August of 2002. See Application, Ex. 5.

Applicant's Objections to OSUMF No. 11:

Lack of foundation, Best evidence:

Applicant's description of services in its application speaks for itself. Opposer's characterization, which purports to summarize the description of services, is inaccurate and appears nowhere in the description of services. What Opposer claims as a "fact" is

nothing more than Opposer's pejorative conclusion, unsupported and without any evidentiary basis.

OSUMF No. 12:

Applicant advertises, promotes and sells her services via, among other means, the Internet. See CherokeeXXX, <http://cherokeexxx.com> (accessed June 23, 2008), Ex. 28.

Applicant's Objections to OSUMF No. 12:

Hearsay:

Applicant incorporates by reference its prior objections to Exhibit 2 as if fully set forth herein. Opposer continues to mistake an internet webpage for a self-authenticating source, contrary to the requirements of TBMP 528.05(e).

Lack of Foundation:

Exhibit 28 is not only unauthenticated, but Opposer has made no effort to establish any relationship between Exhibit 28 and Applicant. Nonetheless, Opposer concludes, without any evidentiary basis at all, that this unauthenticated webpage is an example of Applicant's advertisement, promotion and sale of her services.

OSUMF No. 13:

Applicant's application is unrestricted as to the consumers of or channels of trade for her services. See Application, Ex. 5. As a result, it is presumed that Applicant's services are and/or will be advertised, promoted, and offered through the same and/or similar channels of trade and to the same general class of individuals as Opposer's goods and services are offered under Opposer's CHEROKEE NATION and CHEROKEE marks.

Applicant's Objections to OSUMF No. 13:

Best Evidence:

Contrary to Opposer's contention, Applicant's application identifies both the channels of trade for her services as well as the class of consumers to whom her services are marketed, i.e. "Adults." The application is in evidence and is the best evidence of whether or not Applicant's application is "unrestricted as to consumers of or channels of trade for her services."

Lack of Foundation:

Based on Opposer's erroneous characterization of Applicant's application, it

“presumes” that Applicant’s services will be offered through similar channels of trade and to the same general class of “individuals” [sic]. Opposer has offered no evidence in support of this “fact” other than its own “presumption” about Applicant’s intentions, notwithstanding the express delineation of channels of trade in her application. Opposer’s unsupported “presumptions” constitute, at best, only argument and not evidence. Moreover, Opposer has offered no competent evidence of the channels of trade or classes of consumers for its own goods and/or services.

OSUMF No. 14:

In the specimen submitted with the application, the proposed mark, "CHEROKEE," is prominently displayed four (4) times in an advertisement for live "XXX" rated adult entertainment. See Specimen, Ex. 29.

Relevance:

Exhibit 29: The use of the trademark on the specimens is an appropriate use, and therefore this exhibit is irrelevant as it fails to support any of the issues in this matter. The number of times the trademark is included in the advertisement fails to support a claim of tarnishment.

Lack of Foundation:

Exhibit 29: The recitation of the number of times the mark is used in association with the services is an attempt to suggest tarnishment; however, there is no support for this relationship, or competent opinion, supporting the contention that the number of times a trademark is used in a given specimen enhances the support of a claim of tarnishment.

OSUMF No. 15:

The specimen uses the wording, "NATIVE NATURAL NASTY," implying that the entertainer is Native American and, more specifically, of Cherokee descent. Id. (emphasis added).³

Ftn 3: When capitalized, as it is in Applicant's specimen, the word "Native" means, "of, relating to, or being a member of an aboriginal people of North or South America." See Native, Merriam-Webster Online Dictionary (2009), <http://Merriam-webster.com/dictionary/native> (accessed Mar. 10, 2009), Ex. 30; Native, Encarta World English Dictionary (North American Ed. 2009), <http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=18616324> (accessed Mar. 10, 2009), Ex. 31.

Applicant's Objections to OSUMF No. 15:

Lack of Foundation, Best Evidence:

Exhibits 30 & 31: Though both exhibits purport to contain on-line dictionary definitions of the word, "native," neither states that use of the word "native" when capitalized is ascribed the meaning claimed by Opposer; indeed both sources are silent on the significance, if any, of capitalizing the term "native," and no preference is given by either source to any of the multiple meanings of the word, only one of which references aboriginal people of North or South America. Moreover, by Opposer's own admission, Applicant's specimen contains the quoted phrase in all capital letters, as opposed to "capitalized," i.e. having an initial capital as in a proper name.

Accordingly, Opposer's "fact" is completely unsupported by any evidence, generally, but specifically by the two exhibits proffered by Opposer.

OSUMF No. 16:

The specimen features a female model with long, dark, straight hair and a dark complexion often used in stereotypical portrayals of a "Cherokee Indian Princess." Id.; see Blue Corn Comics, Indian Women as Sex Objects, <http://www.bluecorncomics.com/princess.htm> (accessed Mar. 11, 2009), Ex. 32. Indeed, Cherokee is the most popular tribe of choice among non-Indians claiming to have descended from Indian princesses. Id. at 3.

Applicant's Objection to OSUMF No. 16:

Best Evidence:

Applicant's specimen features a picture of applicant and is the best evidence of what is pictured therein.

Lack of Foundation, Hearsay:

Applicant incorporates by reference its prior objections to Exhibit 2 as if fully set forth herein. Though Opposer may believe that, "if it's on the internet it must be true," TBMP 528.05(e) states otherwise. This unauthenticated screen print, originating from www.bluecorncomics.com, is competent evidence of absolutely nothing, much less the proposition for which it is proffered by Opposer.

Relevance:

Applicant has not claimed “to have descended from Indian princesses,” or, for that matter, to have any relationship whatsoever to native Americans, generally, or members of the Cherokee Nation, specifically.

OSUMF No. 17:

The specimen also features seven three-dimensional stars similar to the three-dimensional star used in Opposer's National Seal since 1871. See Specimen, Ex. 29; The Cherokee Nation, Powersource, <http://www.powersource.com/nation/>, (accessed Mar. 10, 2009), Ex. 33 (describing symbolic meaning of seven-pointed star featured on the Seal of the Cherokee Nation).

Applicant's Objections to OSUMF No. 17:

Hearsay:

Exhibit 33: Applicant incorporates by reference its prior objections to Exhibit 2 as if fully set forth herein. In this instance, the reason for the safeguards provided by TBMP 528.05(e) is obvious: The supposed source of the webpage exhibit, www.powersource.com, brings up a completely unrelated webpage for a company called “POWERSOURCE web application development.” Nothing about this web application development company suggests that it is remotely qualified to provide expert testimony as the Cherokee Nation seals, the meaning of stars, or anything else of relevance to this matter. This document is not remotely admissible pursuant to TBMP 528.05(e). See Declaration of Paul Tauger, Exhibit 1 attached thereto.

Lack of Foundation:

Opposer provides no evidence for its claims that (1) Opposer has a National Seal, (2) that this seal was in use since 1871, or (3) that stars have any symbolic meaning associated with the Cherokee Nation.

OSUMF No. 18:

Applicant's "official home in cyberspace," www.cherokeexxx.com, states that "People call me the Pocahontas of Porn." See CherokeeXXX - PornStar, <http://www.cherokeexxx.com/home.html> (accessed June 23, 2008), Ex. 34 (emphasis added).⁴

⁴ Certain of the exhibits submitted with this brief contain graphic depictions of sex acts, male and female genitalia, and vulgar language. For that reason, those exhibits have been redacted as appropriate. Unredacted copies of these exhibits are available upon request.

Applicant's Objections to OSUMF No. 18:

Relevance:

Exhibit 34: Pocahontas was not a Cherokee Indian. Thus, the relevance of this statement has not been shown. Pocahontas was an emissary between Indian tribes in Virginia and the English. To the extent that this statement suggests she is an emissary among people, it is more of a characterization of the entertainer than some attempt to establish an association with the Cherokee Nation.

Hearsay:

Exhibit 34: Applicant incorporates by reference its prior objections to Exhibit 32 as if fully set forth herein. Indeed, Exhibit 34 is a webpage documents that is a non-governmental website. It therefore fails to meet the admissibility and authentication requirements of TBMP 528.05(e).

OSUMF No. 19:

19. The website, www.nurglespornstars.com, features links to several pornographic thumbnail picture galleries featuring Applicant. See Nurgle's Pornstars Presents, Cherokee, <http://nurglespornstars.com/stars/Cherokee.html> (accessed June 24, 2008), Ex. 35. One such thumbnail gallery is entitled, "Cherokee Naughty Indian Princess." Id. (emphasis added).

Relevance:

Exhibit 35: Nurglespornstars.com is not associated, controlled or condoned by Applicant, and there is no offer of proof that the statements contained therein are truthful or intended to be truthful by the author. Thus, its use is not relevant to Applicant's use, or to prove any perceived consumer association.

Hearsay:

Exhibit 35: Applicant incorporates by reference its prior objections to Exhibit 32 as if fully set forth herein. Indeed, Exhibit 35 is a webpage documents that is a non-governmental website. It therefore fails to meet the admissibility and authentication requirements of TBMP 528.05(e).

OSUMF No. 20:

Applicant's biography and film credits are featured on several websites. See Cherokee Printable Filmography, Cherokee, <http://www.adultfilmdatabase.com/Features/Printable.cfm?Acfa-ID=31070> (accessed June 24, 2008), Ex. 36; Cherokee, Personal Bio,

<http://www.iafd.com/person.rme/perfidy=Cherokee02/gendet=f> (accessed June 24, 2008), Ex. 37. These biographies describe Applicant's ethnicity as "Native American." Id.

Applicant's Objections to OSUMF No. 20

Relevance:

Exhibit 36, 37: There is no evidence that these websites are associated with, or controlled or condoned by Applicant and, indeed, they are not. There is no offering of proof that the statements contained therein are truthful or intended to be truthful by the author. Thus, its use is not relevant to Applicant's use, or to prove any perceived consumer association.

Hearsay:

Exhibit 36, 37: Applicant incorporates by reference its prior objections to Exhibit 32 as if fully set forth herein. Indeed, Exhibit 36 and 37 are webpage documents that are a non-governmental website. It therefore fails to meet the admissibility and authentication requirements of TBMP 528.05(e).

OSUMF No. 21:

The specimen submitted with the application proclaims that the entertainer is "YOUNG HOT AND BEAUTIFUL" and has a "BODY BUILT FOR SEX." See Specimen, Ex. 29. The specimen further notes that Applicant has appeared in "OVER 100 XXX MOVIES." Id.

Applicant's Objections to OSUMF No. 21

Relevance:

Exhibit 29: These portions of the specimen are irrelevant and do not support any fact or contention in this matter. These comments are directed to the entertainer and do not bring about any disparaging connotations in association with the mark, nor is there any competent evidence attesting thereto.

OSUMF No. 22:

The titles and descriptions of adult films in which Applicant has appeared using the CHEROKEE mark reveals that many of those movies are of a deviant sexual nature featuring oral, anal and multiple-partner sex. See Cherokee Printable Filmography, Cherokee,

<http://wvvvvv.adultfilmdatabase.com/Features/Printable.cfm?Acfor1D-31070> (accessed

June 24, 2008), Ex. 36. Cherokee, Personal Bio,
<http://www.iafd.com/person.rme/perfidy=-Cherokee02/gender=f> (accessed June 24,
2008), Ex. 37

Applicant's Objections to OSUMF No. 22:

Hearsay:

Exhibits 36, 37: Applicant incorporates by reference its prior objections to Exhibit 32 as if fully set forth herein. Indeed, Exhibit 36 and 37 are webpage documents that are a non-governmental website. It therefore fails to meet the admissibility and authentication requirements of TBMP 528.05(e).

Lack of Foundation:

Exhibits 36, 37: Opposer fails to offer any competent expert testimony to support the assertion that films in which Applicant has appeared are deviant in nature. The only declarant is Opposer's counsel, Mr. Jorgenson. Declarant Jorgenson's personal opinion regarding whether particular activity is deviant in nature is irrelevant as he is neither an expert in the field of sexual activity and norms thereof, nor has he attested that as an expert he has personally viewed every film in which Applicant has appeared, and verified that the content was deviant.

OSUMF No. 23:

23. Advertisements and promotional materials using the proposed mark feature models in a variety of provocative poses and making vulgar displays of female breasts and genitalia. See, e.g., Cherokee XXX - Porn Star,
<http://www.cherokeexxx.com/home.html> (accessed June 23, 2008), Ex. 34.

Hearsay:

Exhibit 34: Applicant incorporates by reference its prior objections to Exhibit 32 as if fully set forth herein. Indeed, Exhibit 34 is a webpage documents that are a non-governmental website. It therefore fails to meet the admissibility and authentication requirements of TBMP 528.05(e).

Lack of Foundation:

Exhibit 34: Opposer fails to offer any competent expert testimony to support the assertion that oral sex and multi-partner sex is deviant in nature. The only declarant is

Opposer's counsel, Mr. Jorgenson. Declarant Jorgenson's personal opinion regarding whether a particular pose is vulgar is irrelevant as he is neither an expert in the field of sexual activity and norms thereof, nor has he attested that as an expert he has collected evidence that supports this characterization of the pose(s).

OSUMF No. 24:

Opposer's members have long believed that the use of the CHEROKEE name to sell products which are not affiliated with the Cherokee people is a form of exploitation. See Christina Berry, The Word Cherokee Sells--Are You Buying?, http://www.allthingscherokee.com/articlesculture_events_980101.html (accessed Mar. 10, 2009), Ex. 38; Christina Berry, About Us, <http://www.allthingscherokee.com/aboutus.html> (accessed Mar. 12, 2009), Ex. 39.

Applicant's Objections to OSUMF No. 24:

Relevance:

Exhibits 38, 39: The beliefs of Opposer's members is irrelevant to anything at issue in this matter. With respect to an allegation of dilution by tarnishment, the relevant audience for any determination is "a substantial composite of the general public," not members of the opposing organization that owns a service mark. Moreover, "exploitation" is not a cognizable basis for alleging dilution by tarnishment.

Hearsay:

Exhibits 38, 39: Applicant incorporates by reference its prior objections to Exhibit 32 as if fully set forth herein. These exhibits consist of screen prints of an internet webpage.

TTAB rules specifically address such documents:

"Internet evidence and other material that is not self-authenticating. The element of self-authentication cannot be presumed to be capable of being satisfied by information obtained and printed out from the Internet. Internet postings are transitory in nature as they may be modified or deleted at any time without notice and thus are not "subject to the safeguard that the party against whom the evidence is offered is readily able to corroborate or refute the authenticity of what is proffered." For this reason, Internet printouts cannot be considered the equivalent of printouts from, for example, a NEXIS search where printouts are the electronic equivalents of the printed publications and permanent sources for the publications are identified. [citations omitted]
TBMP 528.05(e)

The only authentication provided is by counsel for Opposer and, this is, clearly, insufficient. Indeed, Exhibits 38-39 are documents that appears on a non-governmental

website. They therefore fails to meet the admissibility and authentication requirements of TBMP 528.05(e).

OSUMF No. 25:

In a survey conducted by the magazine, Indian Country Today, 81% of the respondents reported that the use of American Indian names, symbols and images is predominantly offensive and deeply disparaging to Native Americans. See Indian Country Today, American Indian Opinion Leaders: American Indian Mascots, <http://www.printthis.clickability.com/pt/cpt?action=cpt&title-AMERICAN+INDIAN+OP>. (accessed Mar. 10, 2009), Ex. 40.

Applicant's Objections to OSUMF No. 25:

Lack of Foundation, Hearsay:

Opposer cites a survey purportedly conducted by a magazine. The survey methodology is not stated, nor is there any indication that the surveyed sample is representative of "a substantial composite of the general public." The survey is thus inadmissible. *Clicks Billiards, Inc. v. Sixshooters, Inc.* 251 F.3d 1252, 1264, (9th Cir. 2001) ("[I]s the survey admissible? That is, is there a proper foundation for admissibility, and is it relevant and conducted according to accepted principles?")

Hearsay:

Applicant incorporates by reference its prior objections to Exhibit 2 as if fully set forth herein. Opposer persists in proffering internet screen prints without authentication as required by TBMP 528.05(e). Notwithstanding this exhibit's lack of foundation and hearsay nature, it does not consist of magazine's survey, but of an internet printout from a website at www.printthis.clickability.com that claims to have reproduced the magazine survey. This is double hearsay and renders the exhibit inadmissible.

OSUMF No. 26:

The negative use of Opposer's CHEROKEE name, as when that name is used to sell pornographic services and to perpetuate stereotypes about Opposer's members, has long been condemned as "offensive and disgusting" by Opposer. In 2001, the Inter-Tribal Council of Five Civilized Tribes⁵ issued a resolution calling the negative use of American Indian tribal names and images, "an offensive and disgusting practice" and calling for the elimination of "the stereotypical use of American Indian names and images as mascots in sports and other events." See Resolution No. 2001-08, the Inter-Tribal Council of the Five Civilized Tribes, Ex. 42. The resolution was signed on behalf of Opposer by Chadwick Smith, Principal Chief of the Cherokee Nation.⁶ Id. The

Principal Chief of the Cherokee Nation is the chief executive of the Cherokee Nation. He is responsible for the execution of the laws of the Cherokee nation, establishment of tribal policy, and delegation of authority as necessary for the day-to-day operations of all programs and enterprises administered by the Cherokee Nation tribal government. See Cherokee Nation, Executive Branch, <http://Cherokee.org/Government/Executive/Default.aspx> (accessed Mar. 10, 2009), Ex. 43.

The Five Civilized Tribes consist of the Cherokee, Chickasaw, Choctaw, Creek, and Seminole Nations. See The Inter-Tribal Council of the Five Civilized Tribes, <http://www.fivecivilizedtribes.org/Home/tabid/248/Default.aspx> (accessed Mar. 12, 2009), Ex. 41.

Applicant's Objections to OSUMF No. 26:

Relevance:

Exhibits 42, 43: The Inter-Tribal Council of Five Civilized Tribes' resolution purportedly stated that the use of Indian names "as mascots in sports and other events" is a stereotypical use. Applicant is not a mascot, and there is no evidence or allegations to this effect. Therefore, this exhibit is irrelevant as the Council's statement, even if relevant for any purpose, are not relevant in this proceeding. Moreover, Opposer's opinion as to whether Applicant's use of her name is "offensive and disgusting" has no bearing on anything at issue in this matter, as the relevant audience in the context of a dilution by tarnishment analysis is "a substantial composite of the general public," not members of the opposing organization that owns a service mark.

Assumes facts not in evidence:

Opposer has offered no evidence that Applicant uses her mark "to perpetuate stereotypes about Opposer's members."

Hearsay:

Exhibits 42, 43: These exhibits consist of a screen print of an internet webpage.

TTAB rules specifically address such documents:

"Internet evidence and other material that is not self-authenticating. The element of self-authentication cannot be presumed to be capable of being satisfied by information obtained and printed out from the Internet. Internet postings are transitory in nature as they may be modified or deleted at any time without notice and thus are not "subject to the safeguard that the party against whom the evidence is offered is readily able to corroborate or refute the authenticity of what is proffered." For this reason, Internet printouts cannot be considered the equivalent of printouts from, for example, a NEXIS search where printouts are the electronic equivalents of the printed publications and permanent sources for the publications are identified. [citations omitted]

TBMP 528.05(e)

The only authentication provided is by counsel for Opposer and, this is, clearly, insufficient.

Further, exhibit 42, Resolution No. 2001-08, the Inter-Tribal Council of the Five Civilized Tribes is presumably, is offered as either a printed publication or official record, both of which would be self-authentication. It is, however, neither. TBMP 528.05(e) provides, pertinent part, that “printed publications must be available to the general public in libraries or of general circulation among members of the public or that segment of the public which is relevant under an issue in a proceeding.” Exhibit 42, the “Resolution No. 2001-08, the Inter-Tribal Council of the Five Civilized Tribes,” is, by definition, not available to the general public and as such does not qualify as a self-authenticating document.

TBMP 528.05 provides, further, that, “The term “official records,” as used in 37 CFR § 2.122(e), refers not to a party's company business records, but rather to the records of public offices or agencies, or records kept in the performance of duty by a public officer.” Exhibit 42 does constitute such a record and as such does not qualify as a self-authenticating document.

Exhibit 42 is authenticated solely by counsel for Opposer. Counsel lacks personal knowledge of any of the facts contained therein and, as such, is not competent to authenticate the truth of the matter asserted herein.

OSUMF No. 27:

A substantial composite of Opposer's members believe that the use of Applicant's proposed mark in connection with Applicant's entertainment services is disparaging, offensive, dehumanizing, embarrassing and subjects them to ridicule and disrepute. See Declaration of Matthew Sunday, Ex. 44; Declaration of Will D. Frayser, Ex. 45; Declaration of Hailey G. Tyner, Ex. 46; We Are Cherokee, <http://meetthecherokee.cherokee.org/WeAreCherokee/tabid/1719/Default.aspx> (accessed Mar. 12, 2090), Ex. 47.

Applicant's Objections to OSUMF No. 27:

Hearsay:

Exhibits 44-47: All three declarations, which are purported to be supportive of a

substantial composite of the Opposer's members, are merely self-serving statements that summarily conclude that a substantial composite believes the Applicant's mark to be disparaging. Not one of the declarants is an expert, or appears to have a profession or job that would provide them with the "interaction" with other Cherokee members, wherein a determine whether this would be disparaging would be forthcoming, or would allow one to reasonably conclude they are in possession of these alleged opinions. The statements are heresay in that they purport to suggest what all other members of the Cherokee Nation believes.

Lack of Foundation:

Exhibits 44-47: All three declarations, which are purported to be supportive of a substantial composite of the Opposer's members, are merely self-serving statements that summarily conclude that a substantial composite believes the Applicant's mark to be disparaging. Not one of the declarants is an expert, or appears to have a profession or job that would provide them with the "interaction" with other Cherokee members, wherein a determine whether this would be disparaging would be forthcoming, or would allow one to reasonably conclude they are in possession of these alleged opinions. Accordingly, these exhibits are not competent testimony as they lack any foundation.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF VENTURA

I am employed in the County of Ventura, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 2801 Townsgate Road, Suite 200, Westlake Village, California 91361.

On June 19, 2009, I served the following document(s) described as OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT, (with Exhibits 1a-1b, 2, 3a-3d, 4, 5a-5d, 6a-6c, and 7), and including OBJECTIONS TO OPPOSER'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT; and DECLARATIONS OF TIFFANY ADAMS, ANNA M. VRADENBURGH, and PAUL TAUGER on the interested parties in this action by placing ☐ the original ☒ a true copy thereof enclosed in a sealed envelope addressed as follows:

Anthony J. Jorgenson
Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.
320 South Boston Avenue, Suite 400
Tulsa, OK 74103

- ☒ BY MAIL: I caused such envelope to be deposited in the mail at Westlake Village, California. I am "readily familiar" with the office's practice of collection and processing correspondence for mailing. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.
- ☐ BY PERSONAL SERVICE: I delivered such envelope by hand to the offices of the addressee(s) listed above.
- ☐ BY FACSIMILE: I caused the above document(s) to be transmitted to the office of the addressee(s) listed above.
- ☐ BY EXPRESS MAIL: I caused the document(s) to be delivered by overnight Express Mail via the United States Postal Service "Express Mail Post Office to Addressee" to the addressee(s) listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 19, 2009, at Westlake Village, California.

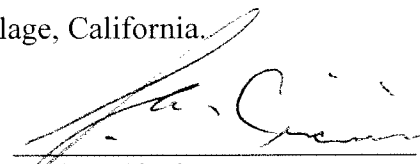

Lori A. Ciccio

EXHIBIT 1a



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Word Mark	CHEROKEE CASINO RESORT
Goods and Services	IC 041. US 100 101 107. G & S: Entertainment services, namely, providing golf course and gaming facilities. FIRST USE: 20040908. FIRST USE IN COMMERCE: 20040908
	IC 043. US 100 101. G & S: Resort lodging, hotel, restaurant and bar services. FIRST USE: 20040908. FIRST USE IN COMMERCE: 20040908
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	01.01.05 - Stars - one or more stars with seven or more points 26.01.07 - Circles with a decorative border, including scalloped, ruffled and zig-zag edges 26.01.20 - Circles within a circle 26.01.21 - Circles that are totally or partially shaded. 26.17.09 - Bands, curved; Bars, curved; Curved line(s), band(s) or bar(s); Lines, curved 26.17.13 - Letters or words underlined and/or overlined by one or more strokes or lines; Overlined words or letters; Underlined words or letters
Serial Number	78405573
Filing Date	April 21, 2004
Current Filing Basis	1A
Original Filing Basis	1B

Published for Opposition October 12, 2004

Registration Number 2961563

Registration Date June 7, 2005

Owner (REGISTRANT) Cherokee Nation Enterprises, Inc. Corporation organized under the laws of the Cherokee Nation, a federally-recognized Indian tribe UNITED STATES 1102-B N. 193rd E. Avenue Catoosa OKLAHOMA 74015

(LAST LISTED OWNER) CHEROKEE NATION ENTERPRISES, L.L.C. LIMITED LIABILITY COMPANY ORGANIZED UNDER THE LAWS OF THE CHEROKEE NATION, A FEDERALLY RECOGNIZED INDIAN TRIBE UNITED STATES 777 WEST CHEROKEE STREET CATOOSA OKLAHOMA 741033708

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record Joseph D. Fincher, Esq.

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "CASINO" and "RESORT" APART FROM THE MARK AS SHOWN

Description of Mark The colors red, black, white and gray are claimed as a feature of the mark. The mark consists of a stylized version of the Seal of the Cherokee Nation in black, red, white and gray.

Type of Mark SERVICE MARK

Register PRINCIPAL

Live/Dead Indicator LIVE

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EXHIBIT 1b



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Word Mark	CHEROKEE HILLS GOLF CLUB
Goods and Services	IC 041. US 100 101 107. G & S: Entertainment services; namely, providing golf course facilities. FIRST USE: 20040908. FIRST USE IN COMMERCE: 20040908
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	02.01.31 - Men, stylized, including men depicted in caricature form 02.09.19 - Diving, humans; Humans, including men, women and children, depicted playing games or engaged in other sports; Playing games or sports, humans 21.03.22 - Clubs for golf; Golf clubs; Putters for golf 26.17.09 - Bands, curved; Bars, curved; Curved line(s), band(s) or bar(s); Lines, curved 26.17.13 - Letters or words underlined and/or overlined by one or more strokes or lines; Overlined words or letters; Underlined words or letters
Serial Number	78405555
Filing Date	April 21, 2004
Current Filing Basis	1A
Original Filing Basis	1B
Published for Opposition	October 12, 2004

Registration Number 2961562

Registration Date June 7, 2005

Owner (REGISTRANT) Cherokee Nation Enterprises, Inc. corporation organized under the laws of the Cherokee Nation, a federally-recognized Indian tribe UNITED STATES 1102-B N. 193rd E. Avenue Catoosa OKLAHOMA 74015

(LAST LISTED OWNER) CHEROKEE NATION ENTERPRISES, L.L.C. LIMITED LIABILITY COMPANY ORGANIZED UNDER THE LAWS OF THE CHEROKEE NATION, A FEDERALLY RECOGNIZED INDIAN TRIBE UNITED STATES 777 WEST CHEROKEE STREET CATOOSA OKLAHOMA 741033708

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record Joseph D. Fincher

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "GOLF CLUB" APART FROM THE MARK AS SHOWN

Description of Mark The colors green, brown and tan are claimed as a feature of the mark. The design portion of the mark depicts a golfer completing his swing, with his shadow cast in the background. The jacket is green, the trousers and shoes are tan, and the socks are brown.

Type of Mark SERVICE MARK

Register PRINCIPAL

Live/Dead Indicator LIVE

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EXHIBIT 2

Document Description: **Off Action Outgoing**Mail / Create Date: **31-May-2006**

To: The Southern Cherokee Nation (gkp@bowersharrison.com)
Subject: TRADEMARK APPLICATION NO. 78758494 - SOUTHERN CHEROKEE NATION - 13172.001
Sent: 5/31/2006 2:39:11 PM
Sent As: ECOM103@USPTO.GOV
Attachments:

UNITED STATES PATENT AND TRADEMARK OFFICE**SERIAL NO:** 78/758494**APPLICANT:** The Southern Cherokee Nation***78758494*****CORRESPONDENT ADDRESS:**

GARY K. PRICE
BOWERS HARRISON, LLP
PO BOX 1287
EVANSVILLE, IN 47706-1287

RETURN ADDRESS:

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MARK: SOUTHERN CHEROKEE NATION**CORRESPONDENT'S REFERENCE/DOCKET NO:**

13172.001

CORRESPONDENT EMAIL ADDRESS:gkp@bowersharrison.com

Please provide in all correspondence:

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2. Date of this Office Action.
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4. Your telephone number and e-mail address.

OFFICE ACTION

RESPONSE TIME LIMIT: TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE MAILING OR E-MAILING DATE.

MAILING/E-MAILING DATE INFORMATION: If the mailing or e-mailing date of this Office

action does not appear above, this information can be obtained by visiting the USPTO website at <http://tarr.uspto.gov/>, inserting the application serial number, and viewing the prosecution history for the mailing date of the most recently issued Office communication.

Serial Number 78/758494

The assigned examining attorney has reviewed the referenced application and determined the following.

No Conflicting Marks Noted

The examining attorney has searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d). TMEP § 704.02.

Mark is Merely Descriptive

The examining attorney refuses registration on the Principal Register because the proposed mark merely describes the goods/services. Trademark Act Section 2(e)(1), 15 U.S.C. Section 1052(e)(1); TMEP §§ 1209 *et seq.*

A mark is merely descriptive under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1), if it describes an ingredient, quality, characteristic, function, feature, purpose or use of the relevant goods/services. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987); *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); *In re MetPath Inc.*, 223 USPQ 88 (TTAB 1984); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979); TMEP §1209.01(b).

Applicant seeks to register the mark “SOUTHERN CHEROKEE NATION.” The mark is made up of three terms: the term, “SOUTHERN” means, “Of, relating to, or characteristic of southern regions or the South.”^[1] The term “CHEROKEE” means, “A Native American people formerly inhabiting the southern Appalachian Mountains from the western Carolinas and eastern Tennessee to northern Georgia, with present-day populations in northeast Oklahoma and western North Carolina. The Cherokee were removed to Indian Territory in the 1830's after conflict with American settlers over rights to traditional lands.”^[2] The term “NATION” means, “The government of a sovereign state.”^[3]

The examining attorney must consider whether a mark is merely descriptive in relation to the identified goods/services, not in the abstract. *In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (C.C.P.A. 1978); *In re Venture Lending Associates*, 226 USPQ 285 (TTAB 1985); *In re American Greetings Corp.*, 226 USPQ 365 (TTAB 1985). TMEP §1209.01(b).

The applicant has applied to register the mark “SOUTHERN CHEROKEE NATION.” for goods/services identified as association services promoting the interests of the Southern Cherokee Nation. The mark merely names the provider and recipient of the services and is considered descriptive for such services. A term that identifies the source or provider of a product or service is merely descriptive under Section 2(e)(1). *In re Major League Umpires*, 60 USPQ2d 1059 (TTAB 2001) (MAJOR LEAGUE UMPIRE merely descriptive of clothing, face masks, chest protectors and skin guards); *In re Taylor & Francis [Publishers] Inc.*, 55 USPQ2d 1213 (TTAB 2000) (PSYCHOLOGY PRESS merely descriptive of books in field of psychology); *In re The Paint Products Co.*, 8 USPQ2d 1863 (TTAB 1988) (PAINT PRODUCTS COMPANY incapable for paint); *In re The Phone Co., Inc.*, 218 USPQ 1027 (TTAB 1983) (THE PHONE COMPANY merely descriptive of telephones).

Section 2(f) Suggested—Distinctiveness Based on 5 Years' Use

EXHIBIT 3a



EXHIBIT 3b

CHEROKEE BRAND

MADE IN
KOREA
100% COTTON
SWEATSHIRT
SIZES: S, M, L, XL, XXL

EXHIBIT 3c



EXHIBIT 3d

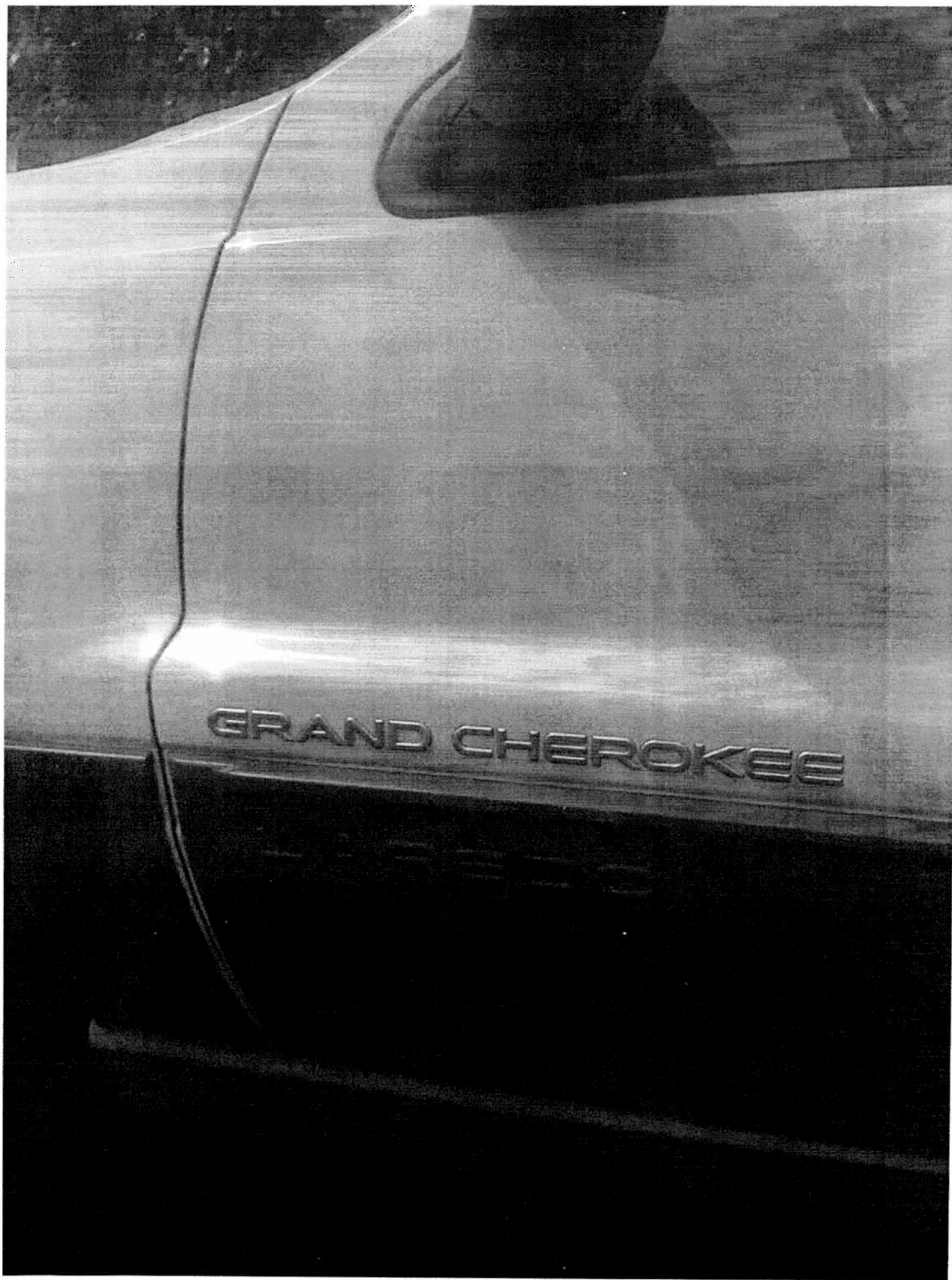


EXHIBIT 4



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Current Search: S4: cherokee[comb] not \"cherokee nation\"[on] docs: 200 occ: 460

	Serial Number	Reg. Number	Word Mark	Check Status	Live/Dead
1	78773672		GEORGIA TRIBE OF EASTERN CHEROKEE	TARR	DEAD
2	78833503	3345822	CURRAHEE	TARR	LIVE
3	78941929		CHEROKEE MOON BAKERY	TARR	DEAD
4	78748323		CHEROKEE	TARR	LIVE
5	78935570		NAGCA YOUR ONE STOP SOURCE FOR JEEP GRAND CHEROKEE INFORMATION	TARR	DEAD
6	78920812		CHEROKEE BENEFITS GROUP	TARR	DEAD
7	78831782		NORTH-EASTERN BAND OF CHEROKEE INDIANS	TARR	DEAD
8	78766186	3280835	CTC SELECT	TARR	LIVE
9	78765168	3280833	CTC SELECT	TARR	LIVE
10	78612461	3079574	CHEROKEE MARINE SERVICES OF NC	TARR	LIVE
11	78605840	3041801	BANKCHEROKEE	TARR	LIVE
12	78562805	3280515	CHEROKEE	TARR	LIVE
13	78520992	3136976	BANKCHEROKEE	TARR	LIVE
14	78097214	2745125	CHEROKEE STATION	TARR	LIVE
15	78071056	2704632	GRAND CHEROKEE	TARR	LIVE
16	78392295	3026838	CHEROKEE SKY	TARR	LIVE
17	78342501		CHEROKEE CHOPPER	TARR	DEAD
18	78337889	2939868	CHEROKEE WHOLESALERS, INC.	TARR	LIVE
19	78316477	2897417	CHEROKEE	TARR	LIVE
20	78285032	2881671	CHEROKEE	TARR	LIVE

21	78285013	3099910	CATCH THE CHEROKEE SPIRIT! SIGNATURE SERIES COMING DOWN YOUR ROAD SOON	TARR	LIVE
22	78283707	3019631	MASERGY	TARR	LIVE
23	78244219		GRAND CHEROKEE FREEDOM	TARR	DEAD
24	78238492		CHEROKEE	TARR	DEAD
25	78190434		CHEROKEE	TARR	DEAD
26	78184527		CHEROKEE	TARR	DEAD
27	78046317	3261721	CHEROKEE	TARR	LIVE
28	78035988		CHEROKEE ROSE	TARR	DEAD
29	78008918		CHEROKEE	TARR	DEAD
30	77082909		LOST CHEROKEE OF ARKANSAS AND MISSOURI	TARR	LIVE
31	77731942		CHEROKEE	TARR	LIVE
32	77396682		ARKANSAS CHEROKEE NATION; CHICKAMAUGA OF ARKANSAS; GWY	TARR	LIVE
33	77698081		CHEROKEE PHARMACEUTICALS A PRWT LIFE SCIENCES COMPANY	TARR	LIVE
34	77281430		CHEROKEE ULTIMATE KHAKI / TWILL	TARR	LIVE
35	77351861	3525507	CHEROKEE PHARMACEUTICALS	TARR	LIVE
36	77281419		CHEROKEE ULTIMATE TEE	TARR	LIVE
37	77367363	3574915	GATEWAY TO THE CHEROKEE NATIONAL FOREST	TARR	LIVE
38	77663620		CHEROKEE ARABIANS	TARR	LIVE
39	77005998		THE LOST CHEROKEE ARKANSAS AND MISSOURI	TARR	DEAD
40	77045405	3322472	THE WHITNEY R. HARRIS INSTITUTE FOR GLOBAL LEGAL STUDIES JUSTICE	TARR	LIVE
41	77581410		CHEROKEE	TARR	LIVE
42	77556232		CHEROKEE MY DOLL	TARR	LIVE
43	77556228		CHEROKEE	TARR	LIVE
44	77542273		CHEROKEE TIMES	TARR	LIVE
45	77221697		C CHEROKEE BANK	TARR	DEAD
46	77311826		ARKANSAS CHEROKEE NATION / CHICKAMAUGA OF ARKANSAS	TARR	DEAD
47	77154235		CHEROKEE'S PET CREATIONS	TARR	DEAD
48	77095083	3386092	CHEROKEE PERFECT	TARR	LIVE
49	77046465	3386015	CHEROKEE ULTIMATE	TARR	LIVE
50	77122071		CHEROKEE STONWORKS	TARR	DEAD
51	76165579	2561532	BUCKSKIN PREMIER CUSHIONED BACKING SYSTEM CHEROKEE CARPET INDUSTRIES	TARR	DEAD
52	76683830		CHEROKEE CHARCOAL	TARR	DEAD
53	76219591	2705236	CHEROKEE SUNSET	TARR	LIVE
54	76977046	2931485	CHEROKEE BABY	TARR	LIVE
55	76976473	2846293	CHEROKEE BABY	TARR	LIVE

56	76656575	3216851		TARR	LIVE
57	76602746		CHEROKEE	TARR	DEAD
58	76477800	2912087	THE ORIGINAL CHEROKEE GREAT SMOKY MOUNTAINS DRINKING WATER	TARR	LIVE
59	76471593	3095987	CHEROKEE MEDICAL	TARR	LIVE
60	76452349		CHEROKEE	TARR	DEAD
61	76449856		CHEROKEE	TARR	DEAD
62	76363285		CHEROKEE CHOICE	TARR	DEAD
63	76337800		CHEROKEE	TARR	DEAD
64	76279029		CHEROKEE ICE	TARR	DEAD
65	76266560		CHEROKEE AN AMERICAN ORIGINAL	TARR	DEAD
66	76255322		C THE CRESCENT CLUB OF CHEROKEE	TARR	DEAD
67	76253276	2909426	CHEROKEE	TARR	LIVE
68	76247620		CHEROKEE FOODS	TARR	DEAD
69	76245388		CHEROKEEFREE'S. COM CHEROKEE FREE'S	TARR	DEAD
70	76219113	2706122	CHEROKEE	TARR	LIVE
71	76185672		CHEROKEE	TARR	DEAD
72	76178920		CHEROKEE BOB'S	TARR	DEAD
73	76178919		CHEROKEE BOB' S	TARR	DEAD
74	76120484		CHEROKEE	TARR	DEAD
75	76103112		CHEROKEE BABY	TARR	DEAD
76	76010310		CHEROKEE	TARR	DEAD
77	75506359	3061405	CHEROKEE PROUD	TARR	LIVE
78	75720703	2571860	CHEROKEE	TARR	LIVE
79	75719833	2574176	CHEROKEE MANUFACTURING	TARR	LIVE
80	75830249		CHEROKEE GUIDE SERVICE	TARR	DEAD
81	75826395	2373046	CHEROKEE INTERNATIONAL	TARR	LIVE
82	75809728		GALVLADI	TARR	DEAD
83	75481065	2308610	SEAL OF THE EASTERN BAND OF THE CHEROKEE NATION NOVEMBER 28, 1870	TARR	LIVE
84	75447608	2346028	CHEROKEE	TARR	DEAD
85	75392419		CHEROKEE	TARR	DEAD
86	75374248		CHEROKEE	TARR	DEAD
87	75355769		CHEROKEE	TARR	DEAD
88	75314347	2935238	CHEROKEE BABY	TARR	LIVE
89	75313055		CHEROKEE	TARR	DEAD
90	75241523		CHEROKEE	TARR	DEAD
91	75206923		CHEROKEE CHESTNUT	TARR	DEAD
92	75201296	2756422	CHEROKEE	TARR	LIVE
93	75151862		PMD CHEROKEE	TARR	DEAD

94	75144397	CHEROKEE	TARR	DEAD
95	75109410	CHEROKEE BEVERAGE	TARR	DEAD
96	75080142	A WORLDWIDE TRADITION THE CHEROKEE LEGEND A DIVISION OF CHEROKEE, INC.	TARR	DEAD
97	75080140	A WORLDWIDE TRADITION THE CHEROKEE GROUP A DIVISION OF CHEROKEE, INC.	TARR	DEAD
98	75066002	CHEROKEE	TARR	DEAD
99	75061232	SEAL OF THE SOUTHEASTERN CHEROKEE CONFEDERACY 1839 NATION 1976	TARR	DEAD
100	75043905	CHEROKEE	TARR	DEAD

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EXHIBIT 5a

6/19/2009

Harrah's Cherokee: North Carolina Ho...

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Adults & Children
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EXHIBIT 5b

CEO GARY LOVEMAN HELPS HARRAH'S CHEROKEE CASINO & HOTEL KICK OFF EXPANSION

CHEROKEE, NC – President, CEO and Chairman of Harrah's Entertainment Gary Loveman was on hand at Harrah's Cherokee to break ground for the casino's \$655 million expansion. The ceremony was held in front of the hotel with a view of the construction already underway. Joining Loveman were Principal Chief Michell Hicks, Tribal Casino Gaming Enterprise Board Chair Norma Moss and Senior Vice President and General Manager Darold Londo.

Loveman addressed the crowd, which included government officials and political leaders from the tribe and surrounding counties, praising the tribe's leadership. "The Eastern Band of Cherokees should be proud of the impressive work being done by your board and commissioners, and your outstanding employees who have worked hard, and continue to work hard daily, to exceed the customers' expectations, and have made this property one of the most successful in the Harrah's brand," he said.

Moss described the expansion as "an investment in [the] future – an investment that will grow our business and bring new opportunity to the tribe and its members, and to our employees from throughout this region who have served us so faithfully."

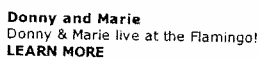
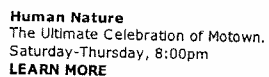
Loveman was also quick to address the tribe's decision to expand during an economic downturn. "When the economy rebounds in 2010, 2011, Harrah's Cherokee will be ahead of the competition, and ready to welcome an influx of new business and new customers anxious for world-class entertainment, accommodations and service!"

Following the ceremony, guests were invited to the hotel ballroom where the celebration continued. Amid large, comfortable easy chairs, small café tables and immense ice sculptures, the casino demonstrated its dedication to the region with North Carolina and South Carolina cheeses, Native American specialties of chestnut bread and fry bread, and southern favorites such as a sweet potato sundae bar. Wild game and trout also were showcased. More than 300 guests mingled, enjoying the food and soft jazz provided by the Sabra Callas Duo.

"We are moving into a new era here at Harrah's Cherokee," said Londo. "Harrah's Cherokee is poised to become a world-class entertainment and tourism destination."

EXHIBIT 5c

Las Vegas Hotels & Las Vegas Casinos...



— *See also* **100-101**



1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

EXHIBIT 5d

<http://www.ballyslasvegas.com/casino...>

TOTAL REWARDS

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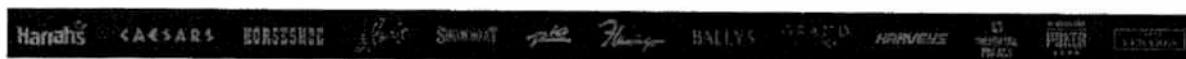
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RESPONSIBLE GAMING



[+]
FEEDBACK

EXHIBIT 6a

Int. Cl.: 33

Prior U.S. Cls.: 47 and 49

United States Patent and Trademark Office

Reg. No. 2,745,125

Registered July 29, 2003

**TRADEMARK
PRINCIPAL REGISTER**

CHEROKEE STATION

ROBERT MONDAVI WINERY (CALIFORNIA
CORPORATION)
841 LATOUR COURT
NAPA, CA 94558

FIRST USE 2-28-2002; IN COMMERCE 2-28-2002.

SN 78-097,214, FILED 12-7-2001.

FOR: WINE, IN CLASS 33 (U.S. CLS. 47 AND 49).

DEZMONA MIZELLE, EXAMINING ATTORNEY

EXHIBIT 6b

Int. Cl.: 34

Prior U.S. Cls.: 2, 8, 9, and 17

United States Patent and Trademark Office

Reg. No. 3,280,515

Registered Aug. 14, 2007

TRADEMARK
PRINCIPAL REGISTER

CHEROKEE



BIRDTOWN ENTERPRISES, INC. (UNITED
STATES CORPORATION OF THE EASTERN
BAND OF CHEROKEE INDIANS, A FEDER-
ALLY RECOGNIZED INDIAN TRIBE.)
2266 OLD MISSION ROAD
CHEROKEE, NC 28719

FOR: CIGARETTES, IN CLASS 34 (U.S. CLS. 2, 8, 9
AND 17).

FIRST USE 3-14-2005; IN COMMERCE 3-14-2005.

OWNER OF U.S. REG. NO. 2,909,426.

SN 78-562,805, FILED 2-8-2005.

THEODORE MCBRIDE, EXAMINING ATTORNEY

EXHIBIT 6c

Int. Cl.: 34

Prior U.S. Cls.: 2, 8, 9, and 17

United States Patent and Trademark Office

Reg. No. 3,280,515

Registered Aug. 14, 2007

TRADEMARK
PRINCIPAL REGISTER

CHEROKEE



BIRDTOWN ENTERPRISES, INC. (UNITED
STATES CORPORATION OF THE EASTERN
BAND OF CHEROKEE INDIANS, A FEDER-
ALLY RECOGNIZED INDIAN TRIBE.)
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FIRST USE 3-14-2005; IN COMMERCE 3-14-2005.

OWNER OF U.S. REG. NO. 2,909,426.

SN 78-562,805, FILED 2-8-2005.

FOR: CIGARETTES, IN CLASS 34 (U.S. CLS. 2, 8, 9
AND 17).

THEODORE MCBRIDE, EXAMINING ATTORNEY

EXHIBIT 7

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Cherokee Nation,)	
)	
Opposer)	Opposition No. 91,185,103
v.)	
)	[Serial Nos. 78/748,323]
Tiffany Adams)	
)	
Applicant)	

**REVISED SUPPLEMENTAL DECLARATION IN SUPPORT OF
MOTION TO STRIKE**

REVISED SUPPLEMENTAL DECLARATION OF ANNA M. VRADENBURGH

The undersigned, Anna M. Vradenburgh, declares the following:

1. I am an attorney licensed to practice law in the State of California and licensed before the United States Patent and Trademark Office. I am an attorney with the firm of Piccionelli & Sarno, the current attorneys of record for the Applicant Tiffany Adams in Opposition No. 91,185,103.

2. On or about March 19, 2009, the undersigned had a telephone conversation with Brandon Rule, Opposer's counsel. In that telephonic conversation, Opposer's counsel agreed to an extension of time in which to respond to the Motion for Summary Judgment, and further, agreed to a 30-day extension of time to file responses to the discovery responses served on March 16, 2009. No specific date was calculated by counsel at the time; however, the undersigned calculated the extension date to be May 20, 2009. This information was confirmed in an electronic mail message transmitted to Mr. Rule on March 23, 2009, attached herewith as Exhibit 1.

3. On March 24, 2009, Mr. Rule confirmed the 30-day extension of time to respond to discovery requests, and did not dispute the undersigned's confirmation of the May 20, 2009, date. See Exhibit 1.

4. Responses to all discovery requests, including admissions, were timely served on May 11, 2009. Accordingly, Opposer's contention in Opposer's Reply in Support of Its Motion for Summary Judgment that Applicant's discovery responses were untimely is false, or at best, a mistake.

The undersigned, Anna M. Vradenburgh, declares under the penalty of perjury of the laws of the United States and the State of California that the foregoing is true and correct; and the undersigned being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, that all statements made of my own knowledge are true and all statements made on information and belief are believed to be true.

Dated: June 17, 2009

By:

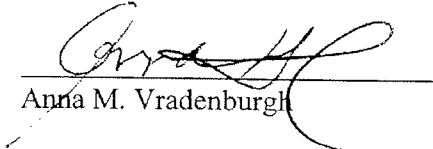

Anna M. Vradenburgh

EXHIBIT 1

From: anna@piccionellisarno.com <anna@piccionellisarno.com>

To: brule@hallestill.com

Cc:

Date: Monday, March 23, 2009 06:40 pm


Subject: Cherokee stipulated consent

Hi Brandon,

Here is the draft stipulated consent agreement. If this is acceptable, please have it signed and faxed back to me or emailed. We will file upon receipt.

Further, this confirms our conversation of March 19, 2009, wherein you agreed to extend the dates to respond to the discovery requests served on March 16, 2009, until May 20, 2009.

Best regards,
Anna

Attachments:  exttime-smj.doc (32KB)

From: Brandon Rule <brule@HallEstill.com>

To: anna@piccionellisarno.com

Cc: Anthony Jorgenson <AJorgenson@HallEstill.com>

Date: Tuesday, March 24, 2009 02:55 pm

Subject: RE: Cherokee stipulated consent

we will stipulate to a 30 day extension of the deadline for Applicant's responses to our discovery requests. Thanks for your consideration on this matter. If you need anything further regarding the joint stipulation, please do not hesitate to contact me.

Thanks,
Brandon

-----Original Message-----

From: anna@piccionellisarno.com [mailto:anna@piccionellisarno.com]

Sent: Monday, March 23, 2009 06:40 PM

To: brule@hallestill.com

Subject: Cherokee stipulated consent

Importance: High

Hi Brandon,

Here is the draft stipulated consent agreement. If this is acceptable, please have it signed and faxed back to me or emailed. We will file upon receipt.

Further, this confirms our conversation of March 19, 2009, wherein you agreed to extend the dates to respond to the discovery requests served on March 16, 2009, until May 20, 2009. We reminded you that since you requested a stay of all trial dates, if the case was suspended, it is likely that the Board will suspend our time in which to respond to discovery until after the disposition of the Motion for Summary Judgement. Please advise us

Opposition No. 91/185,103

DECLARATION OF TIFFANY ADAMS

The undersigned, Tiffany Adams, declares the following:

1. I am the owner of U.S. Application Serial No. 78/748,323 for the mark CHEROKEE ("Mark").
2. I have used the mark identified in the application since at least as early as August 2002. The specimen submitted with my trademark application was for entertainment services to be rendered March 9-13, 2004.
3. My Mark is not a misrepresentation of some affiliation, connection, sponsorship, and/or association with Opposer and Opposer's Marks, nor have I actually ever been confused with, or presumed to be affiliated with, or sponsored by the Opposer. Indeed, my Mark does not consist of or comprise any matter that falsely suggests a connection with Opposer, nor have I ever suggested a connection. Additionally, my Mark does not associate or falsely suggest an association by Opposer and/or its citizens with explicit, sexually-oriented adult services, nor does it associate Opposer, Opposer's members, and/or Opposer's Marks with explicit, sexually-oriented adult entertainment services.
4. My services have never been offered on tribal land.
5. The services provided in association with the Mark are restricted to those 18 years and older. Further, products produced wherein I have performed under the Mark are restricted to purchasers of consumers 18 years and older, at a minimum, and typically are sold in a restricted area. Accordingly, my services and products associated with my performances are not freely available in all channels of trade or to all consumers.
6. The likely meaning of my Mark does not disparage Opposer, Opposer's members, and/or Opposer's Marks. Indeed, a substantial composite of Opposer's members would not find my Mark disparaging, nor has anyone ever indicated to me that it is disparaging.

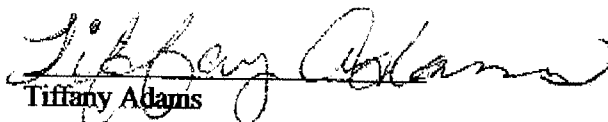
Opposition No. 91/185,103

7. During my performance, I do not chant, mimic rain dances, or adopt any other characteristics that could be construed as emanating from descendents of Native Americans.
8. No person has ever inferred that I am associated with Opposer, nor has any person ever inquired as to whether I was associated with Opposer, nor is my Mark is not intended to associate me with the image of, or portray me as, an "Indian Princess."
9. My Mark is not used to hold out Opposer and/or Opposer's Members as objects of sexual fantasy, nor does it expose Opposer and/or Opposer's members to contempt, embarrassment or ridicule, nor has anyone ever indicated to me that they perceived my Mark as exposing Opposer to contempt, embarrassment or ridicule.

The undersigned, Tiffany Adams, declares under the penalty of perjury of the laws of the United States and the State of California that the foregoing is true and correct; and the undersigned being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, that all statements made of my own knowledge are true and all statements made on information and belief are believed to be true.

Dated: June 19, 2009

By:


Tiffany Adams

DECLARATION OF ANNA M. VRADENBURGH

The undersigned, Anna M. Vradenburgh, declares the following:

1. I am an attorney licensed to practice law in the State of California and licensed before the United States Patent and Trademark Office. I am an attorney with the firm of Piccionelli & Sarno, the current attorneys of record for the Applicant Tiffany Adams in Opposition No. 91,185,103.

2. Annexed as Exhibit 1a-1b to Applicant's Opposition to Motion for Summary Judgment ("Opposition") are true and correct copies of the screen shot of the database records from the U.S. Trademark Office for U.S. Registration No. 2,961,563 and U.S. Registration No. 2,961,562.

3. Annexed as Exhibit 2 to the Opposition is a true and correct copy of the screen shot of the database record from the U.S. Trademark Office for U.S. Serial No. 78/7582,961,563.

4. On or about June 13, 2009, the undersigned took photographs of a yellow colored shirt bearing the trademark CHEROKEE. Further, on or around that same day, the undersigned photographed a utility vehicle bearing the mark GRAND CHEROKEE. Neither of these products is produced by the Opposer. The photographs in Exhibits 3a-3d annexed to the Opposition are true and correct copies of the images taken by the undersigned and have not been altered or enhanced in any manner.

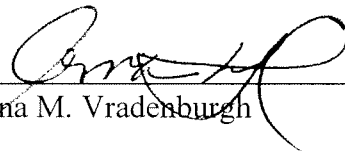
5. Annexed as Exhibit 4 to the Opposition is a true and correct copy of the screen shot of the search results from the database of the U.S. Trademark Office conducted by the undersigned on June 12, 2009.

6. Annexed as Exhibit 6a-6c to the Opposition are true and correct copies of the screen shot of the database records from the U.S. Trademark Office for U.S. Registration No. 2,745,125; U.S. Registration No. 3,280,515 and U.S. Registration No. 2,909,426.

The undersigned, Anna M. Vradenburgh, declares under the penalty of perjury of the laws of the United States and the State of California that the foregoing is true and correct; and the undersigned being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, that all statements made of my own knowledge are true and all statements made on information and belief are believed to be true.

Dated: June 19, 2009

By:


Anna M. Vradenburgh

DECLARATION OF PAUL TAUGER

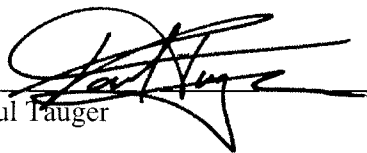
The undersigned, Paul Tauger, declares the following:

1. I am an attorney licensed to practice law in the State of California. I have personal knowledge of the facts set forth below, and generated the printouts for the exhibits discussed herein.
2. Annexed as Exhibit 1 to this declaration is a true and correct copy of the screen shot of the website powersource.com.
3. Annexed as Exhibits 5a-5d to the Opposition are true and correct copies of screen shots of web pages from the internet for Harrahs Cherokee Casino, a press release for the casino, Harrahs general web page, and advertisement for show including topless dancing.

The undersigned, Paul Tauger, declares under the penalty of perjury of the laws of the United States and the State of California that the foregoing is true and correct; and the undersigned being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, that all statements made of my own knowledge are true and all statements made on information and belief are believed to be true.

Dated: June 19, 2009

By:


Paul Tauger

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